SEPARATE OPINION OF JUDGE *AD HOC* SEPÚLVEDA

Third case before the Court claiming breaches in the application and interpretation of Vienna Convention on Consular Relations — Basic agreement with the findings of the Court, but reservations about certain conclusions — Untimely objections on jurisdiction and admissibility — Restricted interpretation of the responsibility of States

The right to diplomatic protection of nationals — The nature of the obligations incumbent upon the United States and to whom are these obligations owed — The institution of diplomatic protection and the institution of consular assistance
*The recognition of the existence of individual rights in the Vienna Convention — The local remedies rule, the doctrine of procedural default and the denial of justice — The "futility" principle — Clemency is not a judicial remedy and thus is not a remedy to be exhausted — Severe restrictions on review and reconsideration because of the procedural default rule — Post-*LaGrand *experience shows remote possibilities of meaningful and effective review and reconsideration*

Unfounded interpretation of the right of consular officers to arrange legal representation — The Miranda warning, fundamental due process rights and Article 36
The nature of the reparation claimed — Meaning of review and reconsideration of convictions and sentences — Lack of effectiveness — Legal basis to declare the cessation of breaches of Article 36 — Previous cases decided by the Court — Insufficient development of the law of State responsibility

1. The present case constitutes a third attempt by the International Court of Justice to resolve issues related to the interpretation and application of the Vienna Convention on Consular Relations. For a third time, the Court is requested to define the nature and scope of certain international obligations established in that treaty and the consequences produced by a breach of the Convention On this third opportunity, the Court is asked to adjudge whether the United States has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection" of 52 Mexican nationals on death row The Court is also required to determine whether Mexico has been deprived of the right it has to provide consular protection and whether the 52 Mexican nationals on death row were deprived of their right to receive such consular protection An affirmative answer to these questions must mean that an international wrongful act of a State entails

legal consequences, the most important one being that Mexico is entitled to reparation for those injuries Yet in the present Judgment, the Court provides only a partial satisfaction to Mexico's claims, establishing in its findings a restricted and limited perspective on a number of matters, especially those related to the essence of the reparations owed

2. Even if I may be basically in agreement with most of the findings of the Court, I have misgivings and reservations about the reasoning employed by the Court to reach certain conclusions Such reasoning is reflected in various operative paragraphs of the Judgment Not being able to concur with all of its terms, I wish to point out the arguments that lead me to question aspects of the Judgment which I may regard as unsatisfactory

I

3 The Court should have rejected, as untimely, the United States objections regarding the jurisdiction of the Court and the admissibility of Mexico's Application It is true that paragraph 1 of Article 79 of the Rules of Court characterizes as preliminary an objection "the decision upon which is requested before any further proceedings" The effect of the timely presentation of such an objection is that the proceedings on the merits are suspended (Art 79, para 5) There is a general understanding that the United States did not submit a preliminary objection but then no other objection of any sort should have been recognized as suitable, if the text of Article 79, paragraph 1, of the Rules of Court is to be strictly interpreted and applied The text states that

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial "

The United States presented its objections to jurisdiction and admissibility far beyond the time-limit prescribed by the Rules of Court More than four months elapsed before the United States provided to the Court a number of objections Thus it is at least arguable that "An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible", and that a party "failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits", as the Court has established (Judgment, para 24) The basic issue relates to the interpretation of the above-quoted first phrase of Article 79, paragraph 1 "Any objection " Following a literal interpretation, any objection has to be submitted within a defined period of time, in accordance with the Rules

of Court. The United States did not comply with such time-limit and its objections should have been rejected by the Court

4. On the other hand, I can certainly accept the observation made by the Court that "many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits" (Judgment, para 24) By examining very attentively each one of the objections to jurisdiction and admissibility advanced by the United States, the Court has provided a richer legal foundation to the basis of its competence, defining and reaffirming the nature of its role as a tribunal with the powers to determine the scope of the international obligations that are a matter of a dispute between the parties

II

5 On two previous occasions the Court has rejected the notion that it is assuming the role of ultimate appellate tribunal in national criminal proceedings. To this effect the Court has found that

> "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal" (*Vienna Convention on Consular Relations (Paraguay* v *United States of America), Provisional Measures, Order of 9 April 1998, I C J Reports 1998,* p 257, para 38).

In the *LaGrand* Judgment, the Court again established the essence of the legal objectives it fulfils, according to its own Statute What is required from the Court is

> "to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings " (*LaGrand, Judgment, I C J Reports 2001,* p 486, para 52)

6 The Court has also established that a dispute regarding the appropriate remedies for the violation of the Vienna Convention on Consular Relations "is a dispute that arises out of the interpretation or application of the Convention and this is within the Court's jurisdiction" (*ibid.*, p 485, para 48)

7 Mexico's final submissions seek to achieve the settlement of an international legal dispute arising out of the interpretation of the Vienna Convention on Consular Relations, with a specific reference to Article 36 Its basic argument is that the application of Article 36 by

the United States is inconsistent with its international legal obligations towards Mexico It follows that if such a breach has been found by the Court, as it happens in the present case, the international law of State responsibility is to come into operation, providing the remedial action that is due as a consequence of an internationally wrongful act

8 Thus the jurisdiction of the Court in this case is beyond doubt and its functions are well defined Furthermore, there is no question that the Court is empowered to determine the legal consequences that arise from an international wrongful act Such consequences entail the obligation to make reparations. The Court can also impose a duty on the State that has committed the internationally wrongful act to perform the obligation it has breached The Court may order the cessation of a wrongful conduct But in the present Judgment, the Court has opted in favour of a restricted interpretation of the law of State responsibility, providing a limited reach to the claims for reparation sought by Mexico The effect of this decision is not only to assign insufficient relief to a breach of an international obligation, but also to miss the opportunity before the Court to substantially develop the international legal foundations of the responsibility of States, to contribute to the jurisprudence of the reparations that are incumbent upon the State that is found to have committed an internationally wrongful act, and to define the nature and scope of the right to a reparation that an injured State is entitled to An unsatisfactory rule on the remedial action that is to be assumed by a State found in a breach of a treaty obligation or of a customary rule may mean a chain of proceedings before the Court in the forthcoming future, as a result of an inconclusive determination of how to remedy a violation of international duties by States

III

9 In its final submission, Mexico requests the Court to adjudge and declare that the United States "violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals" by failing to comply with the duties imposed to it by Article 36, paragraph 1 *(a)*, *(b)* and *(c)*

10 In the operative part of the present Judgment, the Court has found that the United States is in breach of Article 36, paragraph 1 *(a)*, *(b)* and *(c)* Basically, the Court has decided that:

> "by not informing, without delay upon their detention, the 51 Mexican nationals of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention the United States of America breached the obligations incumbent upon it under that subparagraph" (Judgment, para. 153 (4)),
>
> "by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals and thereby

depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 *(b)*" (Judgment, para. 153 (5));

"in relation to the 49 Mexican nationals the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(a)* and *(c)*, of the Convention" (*ibid*, para 153 (6))

11 It is sufficiently clear that the United States of America is in violation of treaty obligations incumbent upon it What is not sufficiently clear in the present Judgment is the nature of the obligations incumbent upon the United States and, more importantly, to whom are these obligations owed? Obviously, the answer to this question has an intimate relationship with the claim made by Mexico that the United States has breached "its international legal obligations to Mexico in its own right and in the exercise of diplomatic protection of its nationals".

IV

12 In the *LaGrand* Judgment it is possible to find an authoritative response to these legal matters. In that case, Germany contended that

"the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers" (*LaGrand, Judgment, I C J Reports 2001*, p 492, para 75)

Thus Germany invoked its right of diplomatic protection, seeking relief against the United States also on this specific ground

13 The Court provided in *LaGrand* a definition of the obligations incumbent upon the United States under Article 36 of the Vienna Convention the recognition that this Article creates individual rights, that such rights may be invoked before the Court by the national State of the detained person, and that these rights were violated in the *LaGrand* case

14 According to the Court, in the terms established in *LaGrand*, the obligation incumbent upon the United States are as follows

"Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State has toward the detained person and the sending State It provides that, at the request of the detained person, the receiving State

must inform the consular post of the sending State of the individual's detention 'without delay' It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State 'without delay' Significantly, this subparagraph ends with the following language 'The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph' (emphasis added) Moreover, under Article 36, paragraph 1 *(c)*, the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposes such action' The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand " (*LaGrand, Judgment, I C J Reports 2001*, p. 494, para. 77.)

15 The clarity that the Court found, in the context of *LaGrand*, of the provisions of Article 36, is no longer found in the context of the present case It seems evident that, in the present case, the previously recognized clarity now admits many doubts and that, now, these provisions must not be applied as they stand

V

16 Clarity is needed to determine whether Mexico has a right to diplomatic protection of its nationals and whether the individual rights already recognized by the Court as having been created may be invoked, in the present case, by the national State of the detained person The answer provided in the Judgment does not sufficiently cover the substance of Mexico's claims. The Court observes that

"violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)* The duty to exhaust local remedies does not apply to such a request " (Judgment, para 40)

17 This statement contained in the present Judgment introduces an undesirable element of vagueness with respect to what had already been advanced in the *LaGrand* Judgment In this latter Judgment, issues related to diplomatic protection, consular assistance and the creation of individual rights by Article 36, paragraph 1, of the Vienna Convention

had been substantially defined Also matters concerning the problems that arise with the application of the procedural default rule and the question of the exhaustion of local remedies were properly and adequately settled by the Court in *LaGrand* In the present Judgment, all these issues are examined under a totally different light, one that is not in every aspect in full harmony and accordance with the *LaGrand* Judgment

18. In *LaGrand*, the Court rejected as unfounded the claim made by the United States that "the Vienna Convention deals with consular assistance it does not deal with diplomatic protection" In its submissions, the United States assumed wrongfully that

> "Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its nationals through diplomatic protection The former is within the jurisdiction of the Court under the Optional Protocol, the latter is not." (*LaGrand, Judgment, I C J Reports 2001*, p 482, para 40)

In its objections to the jurisdiction of the Court, the United States tried to introduce a distinction between jurisdiction over treaties and jurisdiction over customary law, observing that "even if a treaty norm and a customary norm were to have exactly the same content", each would have its "separate applicability"

19 The Court provided an impeccable legal reasoning explaining why the arguments of the United States were untenable

> "The Court cannot accept the United States objections The dispute between the Parties as to whether Article 36, paragraph 1 *(a)* and *(c)*, of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 *(b)* does relate to the interpretation and application of the Convention This is also true of the dispute as to whether paragraph 1 *(b)* creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals Moreover, the Court cannot accept the contention of the United States that Germany's claim based on the individual rights of the LaGrand brothers is beyond the Court's jurisdiction because diplomatic protection is a concept of customary international law *This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty* " (*LaGrand, Judgment, I C J Reports 2001*, pp 482-483, para 42, emphasis added)

20. In its final submissions, Mexico clearly distinguishes between the institution of diplomatic protection and the institution of consular assistance It asks the Court to adjudge and declare

"(1) that the United States of America violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention "

21 The reading of this submission makes obvious that there are two different kinds of breaches · one is related to obligations owed to Mexico in its own right and in the exercise of its right of diplomatic protection of its nationals, the second one has to do with Mexico's deprival of its right to consular assistance and the corresponding right of its nationals to receive such assistance. It is to be understood that

"diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State",

according to the definition of the International Law Commission That is precisely the basis of Mexico's claim

22 It is believed that the Court, in response to Mexico's submission, should have recognized, as a matter of its right to exercise diplomatic protection, the espousal by Mexico at the international level of the claims of the 52 Mexican nationals whose individual rights have been denied, amounting to the denial of justice through the judicial process of the United States Such a recognition would have been particularly relevant in the cases of Mr Fierro Reyna, Mr Moreno Ramos and Mr Torres Aguilera, three cases in which all judicial remedies have been exhausted. But the right of diplomatic protection of Mexico is also valid in the case of the other 49 Mexican nationals, since the application of the doctrine of procedural default by United States courts means, for all practical purposes, that there are no remedies to exhaust, and that the futility rule becomes fully operative, as will be explained later on

23 Had the Court followed its previous jurisprudence and applied it in the present case, it would have been acting in line with the *LaGrand*

Judgment, where the Court rejected the argument made by the United States that "the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the laws of its nationals through diplomatic protection, are legally different concepts" (*LaGrand, Judgment, I C J Reports 2001*, p 493, para. 76). The Court also rejected in *LaGrand* the contention of the United States that "rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance" (*ibid.*) One would have thought that these claims by the United States were put to rest, definitively and convincingly by the Court when it stated that

> "the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person These rights were violated in the present case " (*LaGrand, Judgment, I C J Reports 2001*, p 494, para 77.)

24 If individual rights were violated in the *LaGrand* case, and if individual rights are being violated in the present case, then it follows from these premises that there is only one legal, obvious and necessary conclusion that the individual rights of the 52 Mexican nationals may be invoked in this Court by Mexico. A contrary conclusion is incompatible with the decision of the Court in the *LaGrand* Judgment

VI

25 Furthermore, the present Judgment departs substantially from the findings in the *LaGrand* Judgment in a number of other aspects, related to the circumstances in which local remedies must be exhausted, to application of the procedural default rule and to the question of denial of justice

26 The rules that are to be applied in order to settle the issue of the exhaustion of local remedies have previously been decided by the Court They are linked to the doctrine of procedural default In *LaGrand*, the Court found that

> "the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this Article are intended', and thus violated paragraph 2 of Article 36 " (*LaGrand, Judgment, I C J. Reports 2001*, pp 497-498, para 91)

27. It is generally accepted by the Court that the procedural default rule represents a bar to obtain a remedy in respect of the violation of the rights contained in the Vienna Convention. Thus Mexico's claims cannot be rejected on the basis of the non-exhaustion of local remedies, as "it was the United States itself which failed to carry out its obligations under the Convention", as was rightly established by the Court in *LaGrand.*

28. Local remedies must be exhausted, but not if the exercise is "a clearly futile and pointless activity" (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1961*, p. 145). The need for the principle of the exhaustion of local remedies to have a degree of effectiveness was provided by the Court when it found that

> "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, *and without success*" (*Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989,* p. 46, para. 59, emphasis added).

29. The United Nations International Law Commission (ILC) has been working on the topic of diplomatic protection for a number of years. The Special Rapporteur, in his Third Report, submitted to the ILC a draft Article by which local remedies do not need to be exhausted if they provide no reasonable possibility of an effective redress. Thus the non-recourse to local remedies require a tribunal to

> "examine circumstances pertaining to a particular claim which may not be immediately apparent, such as the independence of the judiciary, the ability of local courts to conduct a fair trial, *the presence of a line of precedents adverse to the claimant and the conduct of the respondent State.* The reasonableness of pursuing local remedies must therefore be considered in each case." (ILC, Third Report on Diplomatic Protection, A/CN.4/523, 7 March 2002, para. 45, emphasis added.)

30. There is an evident need to examine the nature of the remedies that are to be exhausted. For these purposes, the "futility rule" is to be applied. There is a clear support to the notion that

> "the local remedies which must be exhausted include remedies of a legal nature 'but not extra-legal remedies or remedies as of grace', or those whose 'purpose is to obtain a favor and not to indicate a right'. Administrative or other remedies which are not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule." (ILC,

Third Report on Diplomatic Protection, A/CN 4/523, 7 March 2002, para 14)

Thus clemency is not a local remedy that must be exhausted, and, as the Court has found in the present Judgment, clemency is "not sufficient in itself to serve as an appropriate means of 'review and reconsideration'" (para 143) The reason for this finding is that "the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned" (Judgment, para. 141). Thus the Court regards clemency as a non-judicial procedure

31 The ILC Special Rapporteur on Diplomatic Protection establishes in his commentary, included in his Third Report, that there is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile The reason for this is that a claimant is not required to exhaust justice in a foreign State "when there is no justice to exhaust" (ILC, Third Report on Diplomatic Protection, A/CN 4/523, 7 March 2002). As a result of the application of the procedural default rule by the United States courts to the Mexican nationals that are under Mexico's diplomatic protection, it is not suitable to sustain that there is a need to exhaust local remedies when it has already been found that the doctrine of procedural default imposes a judicial bar to such remedial action, thus establishing a legal impediment to a municipal redress

VII

32 As interpreted by the Court in the *LaGrand* Judgment, Article 36, paragraph 2, imposes a number of obligations on the parties:

(a) As a consequence of the determination made by the Court of the nature of the rights contained in Article 36, paragraph 1, "the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual" (*LaGrand, Judgment, I C J Reports 2001*, p 497, para 89)

(b) The specific application of the "procedural default" rule becomes problematical when the rule does not "allow the detained individual to challenge a conviction and sentence" by claiming that a breach of the "without delay" consular notification has occurred, "thus preventing the person from seeking and obtaining consular assistance from the sending State" (*ibid.*, p 497, para 90)

(c) At the request of the detained person, the sending State has the right to arrange for his legal representation

(d) The procedural default rule is an impediment for the United States

courts to attach "any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for [its nationals] and otherwise assisting in their defence as provided for by the Convention" (*I C J Reports 2001*, pp 497-498, para 91)

(e) The procedural default rule had the effect, under these circumstances, of preventing "'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violated paragraph 2 of Article 36" (*ibid*, p 498, para 91).

33. Yet, according to the evidence provided in the written and oral proceedings, the United States courts, even after *LaGrand*, still continue to apply the procedural default rule in the same manner as those courts did in the pre-*LaGrand* phase The reason submitted by the United States is that "procedural default rules will possibly preclude such claim on direct appeal or collateral review, unless the court finds there is cause for the default and prejudice as a result of these alleged breach" (Counter-Memorial of the United States of America (CMUS), para 6 65) However, no court in the United States has found that "there is cause for the default and prejudice" in cases of a Vienna Convention claim, under the argument that Article 36 rights are not constitutional rights

34 In this context, it may be useful to recall what Justice Stevens, of the United States Supreme Court, had to say on the matter The Supreme Court declined to grant *certiorari* to hear a recent case, but in this separate opinion, Justice Stevens stated

> "applying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair. The ICJ's decision in *LaGrand* underscores that a foreign national who is presumptively ignorant of his right to notification should not be deemed to have waived the Article 36 protection simply because he failed to assert that right in a state criminal proceeding " (CR 2003/24, para 244)

35 The actual and accepted practice of the United States courts on the interpretation and application of Article 36, paragraph 2, and of the *LaGrand* Judgment imposes severe restrictions on the concept of review and reconsideration, since it fails to provide a legal remedy that may be in agreement with the letter and the spirit of the Vienna Convention and *LaGrand* The United States courts are condemned to repetition, since a legal straightjacket is imposed by the prevailing system, a system that

does not regard a breach of Article 36 as a breach of a constitutional right.

36 The detained foreign person subject to a trial in the judicial system of the United States will find himself trapped in a cloistered legal situation He may be unaware of his rights to consular notification and communication And then due to the failure of the competent authorities to comply with Article 36, he will be unable to raise the violation of his rights as an issue at trial. Because of that, and since he did not claim his rights at the proper judicial time due to ignorance, federal and state courts will hold the doctrine of procedural default, which will bring about the defeat of remedies for the violation of rights established by Article 36 As a result of this chain of judicial events, there will be a legal impossibility to escape from this entrapment unless a way out is provided by a precise definition of the purposes that are to be achieved by a process of review and reconsideration Such a definition must break the barrier that imposes a recurrent and absurd circular legal argument, one that paralyses any meaningful remedial action that may be undertaken when there is a breach of Article 36

37. In the present Judgment the Court correctly states (para 112) that the problem to which attention was drawn in the *LaGrand* case, and which is also pertinent in the present case,

> "'arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State.' (*I C J Reports 2001*, p 497, para 90) "

On this basis, the Court concluded in *LaGrand* that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (*I C J Reports 2001*, p. 497, para 91) But what is even more relevant is the finding of the Court in the present case "This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation " (Judgment, para 112) Furthermore, there is one additional important conclusion·

> "the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial" (Judgment, para 113)

38 In examining the issue of the procedural default doctrine, the Court seems to agree, in the first instance, with the contention made by Mexico, the argument as expressed by Mexico being basically the following

> "'a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*' [Memorial of Mexico (MM), para. 224] The rule requires exhaustion of remedies, *inter alia,* at the state level and before a *habeas corpus* motion can be filed with federal courts. In the *LaGrand* case, the rule in question was applied by the United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal [MM, paras 228-229] " (Judgment, para 111)

39 There seems to be an essential coincidence between Mexico's arguments and the reasoning contained in the present Judgment The Court establishes the following basic premises

(a) "the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial",

(b) "[i]t thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia,* that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence",

(c) "[i]n such cases, application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded, under this Article are intended', and thus violate paragraph 2 of Article 36";

(d) "in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings" (Judgment, para 113)

40 Being in essence in agreement with these fundamental premises, the Court and Mexico then part company and reach different conclusions Mexico contends that the United States has violated and continues to violate the Vienna Convention

> "By applying provisions of its municipal law to defeat or foreclose remedies for the violation of rights conferred by Article 36 — thus failing to provide meaningful review and reconsideration of severe

sentences imposed in proceedings that violated Article 36." (MM, p 93, para 226)

41 One first issue in Mexico's argument is related to the continuity in the non-compliance and the non-applicability, in the courts of the United States, of the concept of "review and reconsideration" mandated in *LaGrand* But there is an additional element

> "despite this Court's clear analysis in *LaGrand*, U S courts at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36" (MM, p 93, para 227).

42 More as an expression of hope than as a reflection of the mechanics that have been imposed in the United States courts by the application of the procedural default doctrine, the present Judgment finds that, with the exception of Mr. Fierro (case No 31), Mr Moreno (case No. 39) and Mr Torres (case No. 53), where conviction and sentence have become final, in none of the other 49 cases

> "have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases, that is to say, all possibility is not yet excluded of 'review and reconsideration' of conviction and sentence, as called for in the *LaGrand* case
> It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention " (Judgment, para 113.)

43 The Court may be right in leaving open a possibility of a process of review and reconsideration and in finding that it is premature to conclude that there is already a breach of Article 36 But if the post-*LaGrand* experience is of any value, the potential to submit the rule of procedural default to a meaningful and effective system of review and reconsideration by the courts of the United States is rather remote Notwithstanding the clear mandate provided in the *LaGrand* Judgment, the aftermath of *LaGrand* provides evidence that there is little judicial wish in the United States courts to "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth" in the Vienna Convention, as ordered by the Court in the *LaGrand* Judgment

44 The fact is that, as has been already stated, no judicial review and

reconsideration is left for Mr Fierro (case No. 31), Mr Moreno (case No 39), and Mr Torres (case No 53), since there are no further judicial remedies for these three Mexican nationals who, according to the Court, have been at risk of execution at least from the time the Court ordered provisional measures on 5 February 2003, obligating the United States to take all necessary steps to ensure that they were not executed before the Court rendered judgment on Mexico's claims In addition to these three cases, ten Mexican nationals are unable to challenge their convictions and sentences on the basis of violations of Article 36, paragraph 1, because their ability to do so has been barred by the procedural default doctrine Furthermore, 18 Mexican nationals will find themselves in a similar situation, because they did not raise the Vienna Convention claims at trial Again, because of the procedural default rule, they will also be barred from challenging their convictions and sentences on this basis, once they attempt to raise the claim on appeal or in post-conviction proceedings that are still ongoing (CR 2003/24, p 69, para 245)

45 It seems far beyond the realm of the possible that these 31 Mexican nationals can rely, once they have no further judicial redress, or once they are subject to the application of the procedural default doctrine, on a process of judicial review and reconsideration by the United States courts The room for legal manœuvring is already too narrow to deposit any realistic hope in an effective and meaningful judicial remedy once the procedural default rule is put into operation One cannot but share the view provided by the Court in the present Judgment

> "The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution " (Judgment, para 134)

Yet having reached such an unobjectionable conclusion, the Court does not follow its holding to its ultimate consequences, remaining much too shy as to the redress that should be provided. It is not unreasonable to assume that once the judicial process is completed and the remedies for the violations are finally unavailable, a denial of justice may come into being, unleashing a chain of legal consequences at the international level

VIII

46 According to Article 36, paragraph 1 *(c)*, consular officers have the right to arrange for the legal representation of a national who is in prison, custody or detention Such a right is particularly important in

cases in which a severe penalty may be imposed In a peculiar interpretation of the nature of this right, in the present Judgment it is pointed out that

> "the exercise of the rights of the sending State under Article 36, paragraph 1 *(c)*, depends upon notification by the authorities of the receiving State It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation "
> (Judgment, para 104)

And then the Judgment reaches a conclusion that may have no factual or legal support

> "the Mexican consular authorities learned of their national's detention in time to provide such assistance, either through notification by United States authorities (*albeit belatedly in terms of Article 36, paragraph 1* (b)), or through other channels" (*ibid* , emphasis added)

in the case of the 16 Mexican nationals that are listed in the Judgment, providing their name and the number of their case

47 A review of these 16 cases should lead to a different conclusion In most if not all cases legal representation was badly needed from the very beginning, when such assistance is of the utmost necessity and benefit In certain of the quoted cases the legal representation was provided when the Mexican national had already been convicted There are certain cases of severe mental illness that required proper legal representation at an early stage of the trial, one that could have been provided by a consular officer ready to assist also in the impaired and disadvantaged condition of the mentally ill Mexican national There are cases of mental retardation, a circumstance that facilitated incriminating statements made without a lawyer being present, which later negatively affected the Mexican national during his trial There are certain cases of confessions obtained through torture, an event that would certainly contradict the notion that notification was not so late as to effectively preclude arranging legal representation There are certain cases of Mexican nationals that understood no English whatsoever, be it written or spoken, and yet had to sign self-incriminating statements without the benefit of an interpreter or of a Spanish-speaking lawyer There are certain cases where Mexican consular officials learned of the arrest of a Mexican national three years after his arrest, once he had been already sentenced to death

48 From a legal point of view, a matter of great concern must be the notion implicit in the Judgment that notification under Article 36, paragraph 1 *(b)*, albeit not made "without delay", was not so late as to effectively preclude legal representation (Judgment, para 104) In most if not

all of the 16 cases quoted there was no consular notification made by the competent authorities, which has already been found to be a violation of Vienna Convention obligations In the operative part of the Judgment, the Court clearly establishes that the United States is in breach of the obligations imposed upon it by Article 36, paragraph 1 *(a)*, *(b)* and *(c)* Three fundamental breaches are found by the Court (not informing without delay of the rights of 51 Mexican nationals, not notifying the appropriate Mexican consular post without delay of the arrest of 48 Mexican nationals, depriving Mexico of the right to provide, *in a timely fashion*, assistance to the individuals concerned, depriving Mexico of the right, *in a timely fashion*, to communicate with and have access to its nationals and to visit them in detention) Yet it seems rather odd that the Court, in spite of these findings, establishes, with no further argument, that "Mexican consular authorities learned of their national's detention in time to provide" legal assistance Furthermore, the "without delay" breach, already established by the Court, radically contradicts the idea that legal representation may be provided at a later period, belatedly, whatever the circumstances of the detention and whatever the stage of the trial may be, without infringing Article 36, paragraph 2. This exegesis of the Vienna Convention finds no foundation in the text of the treaty and defeats the traditional rules of hermeneutics But, in addition to the breach of Article 36, nothing in the Vienna Convention allows for such an interpretation, one that subjectively declares whether or not legal representation in accordance with Article 36, paragraph 1 *(c)*, is being provided at the right time Such an interpretation does not comply with the Vienna Convention or with any of the previous holdings of the Court Yet its consequences are most damaging It means excluding from the decision of the Court those 16 cases quoted in paragraph 104 of the present Judgment. If, as Mexico claims, it has been deprived specifically to arrange legal representation, and consequently its nationals were deprived of the possibility of receiving the corresponding assistance, under Article 36, paragraph 1 *(c)*, and the claim is to be applicable only to the 34 Mexican nationals listed in paragraph 106 (4) of the Judgment and mentioned in finding No 7 of its operative part, then the dramatic effect is that, without any legal or factual basis, Mexico and 16 Mexican nationals are being deprived of their right to provide and receive legal representation in criminal proceedings that have resulted in their being on death row Such a dramatic effect runs contrary to previous findings by the Court:

"It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to pro-

> vide the requisite consular notification without delay, . the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1 It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen." (*LaGrand, Judgment, I C J Reports 2001*, p 492, para. 74)

49 The purpose of Article 36 is to facilitate the exercise of consular functions related to nationals of the sending State It imposes a number of obligations on the receiving State and provides certain rights of consular protection on behalf of a national of the sending State that has been "arrested or committed to prison or to custody pending trial or is detained in any other manner" Whenever such an event may happen, the receiving State "shall, without delay, inform the consular post of the sending State". Additionally, "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention to arrange for his legal representation" Surely the essential objective of this principle is to guarantee that the protected national who is in prison, custody or detention has the benefit of expert legal advice before any action is taken potentially detrimental to his rights As a consequence of this principle, the notification should be given immediately and prior to interrogation, especially in the case of serious crimes, if the exercise of right is to be useful

IX

50 The right of the consular officer to arrange for the legal representation of the protected national is beyond question If the competent authorities of the receiving State are under the obligation to inform the protected national, without delay, of his rights of consular assistance, which include arranging for legal representation, in accordance with Article 36, then this principle can be regarded as closely related, in spirit and content, to the Miranda warning. The Advise of Rights established in the Miranda warning comprises seven elements Four of them are directly linked to legal representation

(a) you have the right to talk to a lawyer for advice before we ask you any questions,
(b) you have the right to have a lawyer with you during your questioning,
(c) if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish, and

(d) if you decide to answer questions now without a lawyer present, you have the right to stop answering at any time

51. To be useful, the consular right to arrange for the legal representation of the protected national should be exercised by the sending State as soon as possible There should be a corresponding obligation on the part of the receiving State not to undertake any action that may affect the rights of the protected person To this effect, it may be useful to quote *LaGrand*

> "the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, *in a timely fashion*, from retaining private counsel for them and otherwise assisting their defence as provided for by the Convention" (*LaGrand, Judgment, I C J Reports 2001*, pp 497-498, para. 91, emphasis added)

52 The essence of the controversy centres on the nature and scope of the rights provided by Article 36. If the United States courts deny that the Vienna Convention creates individual rights no conciliation will be found with the *LaGrand* Judgment, which has already recognized the existence of such individual rights The issue to be decided is whether a breach of Article 36 will mean, under certain circumstances, a breach of a constitutional right, thus violating the principle of due process of law and the individual rights of the foreign national subject to a trial.

53 The Miranda warning, an integral part of the United States system of constitutional rights, includes a number of principles related to legal representation, regarded as fundamental due process rights. One of the purposes of Article 36 is to identify and validate certain individual rights This principle has been clearly established in the *LaGrand* Judgment To exercise an individual right there is a need to provide a mechanism for its implementation, since rights do not operate in a void. The importance of this mechanism is particularly relevant whenever there is a breach of the corresponding obligations, imposing a duty to redress the wrong done

54 The Miranda warning provides the foundation for due process of law of the detained person from the very moment of his arrest As may be understood by the findings in the *LaGrand* Judgment and in the present Judgment, under certain circumstances Article 36 establishes a number of basic elements to ensure a fair trail from the time a foreign national is subject to custody by competent authorities up to the end of his judicial process. There is an intimate link between the Miranda warning and Article 36 in the sense that both aim at creating a scheme of protection of rights that directly impinge on the fairness of a trial This scheme of protection may and should become effective and operative from the very first

stages, preserving the rights of the detained person from an interrogation that may do him an unjustified harm at a later period of his judicial process. Under these assumptions, the individual rights of a detained person will be better protected if the corresponding consular officer arranges for his legal representation, involving a defence counsel of quality and with experience in the legal procedures that affect foreign nationals in capital cases The scheme of protection will also be essential on other issues that are also an integral part of due process of law plea-bargaining, the gathering of evidence, submission of investigative evidence

55 Consular protection may be an important element for due process of law, especially in capital cases Depending on the circumstances of each case, individual rights emanating from Article 36 can be equated with constitutional rights when the question to decide is closely related to the fair administration of justice If this premise is recognized and accepted, then the Fifth Amendment to the United States Constitution can be invoked This amendment specifically provides for procedural guarantees in cases of "a capital or otherwise infamous crime", adding that no person shall "be deprived of life, liberty or property, without due process of law"

56 In *LaGrand*, the Court found that "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention" These rights must be considered fundamental to due process A distinction has been made by the United States, arguing that those rights are procedural rights and not substantive rights But it may well be that a violation of a procedural right will profoundly affect due process of law There has to be a fine line drawn between substantive rights and procedural rights in certain cases In the Miranda warning, is the right to talk to a lawyer for advice before any questions are asked a substantive or a procedural right? Whatever the preference may be the answer to this question, the fact is that the Miranda warning is embedded in the constitutional system of the United States and is part of its legal culture Fundamental procedural rights become an essential element in the protection of individual rights, transforming a legal instrument into a constitutional principle Thus the rights afforded by Article 36 of the Vienna Convention should be considered fundamental to due process

57 The Court found, in the *LaGrand* Judgment, that

"Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State has towards the detained person and the sending State

> Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person " (*I C J Reports 2001*, p 494, para 77)

The sending State is thus the depository of a right to provide consular protection to its detained nationals, and foreign nationals have the right to seek the assistance of its consular officers when detained By depriving Mexico and its nationals of the exercise of the rights provided in the Vienna Convention and established by the Court in *LaGrand*, the breach committed by the United States has resulted in fundamentally unfair criminal proceedings for the Mexican nationals

X

58 Mexico has requested that, "pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, [it] is entitled to full reparation for these injuries in the form of *restitutio in integrum*" In the present Judgment, the Court seems, at first, to agree to the petition made by Mexico It quotes what it considers to be the general principle applicable to the legal consequences of an internationally wrongful act "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form " (*Factory at Chorzów, Jurisdiction, Judgment No 8, 1927, P C I J , Series A, No 9*, p 21) Then the Court takes the argument further by quoting a classical elaboration of what reparation means:

> "The essential principle contained in the actual notion of an illegal act — a principle that seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed " (*Factory at Chorzów, Merits, Judgment No 13, 1928, P C I J , Series A, No 17*, p 47)

59 If the Court had assumed the full consequences of this finding, made by its judicial predecessor, by establishing that, in the present case, the reparation for the violation should lie in "re-establishing the situation which would, in all probability, have existed if that act had not been committed", that would have meant answering affirmatively all the remedial actions requested by Mexico

60 But the Court has preferred to remain aloof from the principle of restoration and concentrate its attention in defining what it considers to be the task of the Court in the present case, which is "to determine what would be adequate reparation for the violation of Article 36" (Judgment, para 121) a concept that according to the Judgment "varies depending

upon the concrete circumstances surrounding each case and the precise nature and scope of the injury" (Judgment, para. 119) The Judgment concludes that

> "the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts " (Judgment, para. 121)

This finding falls short of what Mexico had requested, since Mexico was sustaining its arguments on the basis of the "essential principle" consecrated in the *Chozów Factory* case and previously recognized by this Court, which is to re-establish the situation which would, in all probability, have existed if that act had not been committed

XI

61 There is, in the present Judgment, a definition of the character and scope of review and reconsideration of convictions and sentences. The qualification is that is has to be carried out "taking account of the violation of the rights set forth in the Convention", as established in the *LaGrand* Judgment, and "including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation" (Judgment, para 131). Unfortunately, this qualification is not specifically included in the respective finding that is contained in the operative paragraphs of the Judgment

62 The scope of the obligation to allow "review and reconsideration of the conviction and sentence" has to be interpreted examining Article 36 as a whole. As the Court found in *LaGrand*, the first paragraph of this Article "begins with the basic principle governing consular protection: the right of communication and access" Next comes the modalities of consular notification Then there are the measures consular authorities may take in rendering consular assistance to a detained national If this interrelated system of consular protection is breached, there is a duty of the receiving State to undertake certain measures, which are, according to the *LaGrand* Judgment, the following

(a) Where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties, it would be incumbent upon (the receiving State) to allow the review and reconsideration of the conviction and sentence.

(b) The review and reconsideration process must take into account the violation of the rights set forth in this Convention.

(c) The obligation to review and reconsider can be carried out in various ways; the choice of means must be left to the receiving State

63. Article 36, paragraph 2, of the Vienna Convention and the *LaGrand* Judgment impose an essential condition: the process of review and reconsideration must take into account the violations of the rights set forth in the Convention and the process must give full effect to the purposes for which the rights accorded in Article 36 are intended. In *LaGrand,* the Court also found the United States in breach of its obligations by "not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers . . ." (*LaGrand, Judgment, I.C.J. Reports 2001*, p. 515, para. 128 (4)).

64. Indeed the rights that are stipulated in Article 36, paragraph 1, are to be implemented in accordance with the laws and regulations of the receiving State. But these laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended". In the present Judgment, it is difficult to find any clarifying statements as to how these obligations are to be implemented and what are the precise conditions that are to be applied in order to ensure that the process of review and reconsideration will be effective and meaningful. Such statements and conditions should be an integral part of the Judgment, particularly in its operative part, as an essential determination of the remedial measures that are being required by the Court.

65. The United States has indicated that, if there has been a breach of Article 36,

> "The whole point is simply to examine the conviction and sentence in light of the breach to see whether, in the particular circumstances of the individual case, the Article 36 breach did have some consequences — some impact that impinged upon fundamental fairness and to assess what action with respect to the conviction and sentence that may require." (CR 2003/29, p. 20, para. 3.6, Philbin.)

It is also said by the United States that it is true that

> "if a defendant fails to raise a claim under the Vienna Convention at the proper time, he will be barred by the procedural default rule from raising the claim on appeal. Here again, however, as long as the defendant has preserved his claim relating to the underlying injury, an injury to some substantive right — such as a claim that he did not understand that he was waiving his right to counsel in an interrogation — that claim can be addressed. As a result, an examination of the impact of the Article 36 violation on the trial and its fundamental fairness — which is at the core of review and reconsideration called for by *LaGrand* — is fully available." (CR 2003/29, p. 25, para. 3.23, Philbin.)

66 Yet, according to the evidence provided in the written and oral proceedings, the United States courts, even after *LaGrand*, continue to apply the procedural default rule in the same manner as its courts did in the pre-*LaGrand* phase The reason submitted by the United States is that "procedural default rules will possibly preclude such claim on direct appeal or collateral review, unless the court finds there is cause for the default and prejudice as a result of these alleged breaches" (CMUS, p 111, para 6 65) However, no court in the United States has found that "there is cause for the default and prejudice" in cases of a Vienna Convention claim, under the argument that Article 36 rights are not constitutional rights The weakness and limitations of ordering a process of review and reconsideration become evident when the results have proven to lack effectiveness

67. There is a need to define the nature of the obligations imposed by the concept "by means of its own choosing". If the issue is not properly clarified by the Court, the two Parties in the present case will not have a sufficiently solid legal guideline on the adequate measures to be undertaken in order to find the reparation sought by Mexico and in order to comply with the remedy decided by the Court to relieve the United States of its responsibility The settlement of this issue is necessary in order to deal with the consequences that arise by virtue of an internationally wrongful act The responsible State has the duty to make full reparation for the injury caused by its wrongful act To dispel any potential misunderstandings, there is a precedent that provides a guideline and that can be invoked in order to ensure a clear definition. The Permanent Court of International Justice found that there is a need to

> "ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" *(Interpretation of Judgments, Nos 7 and 8 (Factory at Chorzów), Judgment No 11, 1927, P C I J , Series A, No 13*, p 20).

68. Full reparation seems unlikely to be achieved if the ambiguity of the notion of "by means of its own choosing" remains and is not strengthened with the addition of some specific measures. From the existing evidence in the pre-*LaGrand* and post-*LaGrand* periods, the United States has followed a pattern of compliance with the Vienna Convention and the Court's Judgment that is far from satisfactory To claim that a clemency procedure is a sufficient instrument to carry out the obligations contained in the *LaGrand* Judgment is to ignore the need for an adequate reparation As the Permanent Court of International Justice found,

> "the essential principle is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the

situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No 13, 1928, P C I J , Series A, No 17*, p 47)

69 The remedial action to be provided must determine how the laws and regulations of the United States, introducing an element of effectiveness that has to be mandatory and compulsive, will "enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended" The review and reconsideration of the conviction and sentence has to take into account the breach of the rights set forth in the Convention These rights should be considered as belonging to the category of fundamental rights that impinge on due process of law If full effect is to be given to the purposes of these rights, and if the review and reconsideration has to take into account the nature of the violation of the rights, then the margin in the application of the principle of "by means of its own choosing" becomes far narrower The means must be effective and the choosing has to be very selective

70 Mexico's request for a meaningful and effective review and reconsideration of convictions and sentences finds support in the Commentary to Article 35 contained in the International Law Commission's Draft Articles on State Responsibility

> "the term 'juridical restitution' is sometimes used where restitution *requires or involves the modification of a legal situation either within the legal system of the responsible State* or in its legal relations with the injured State Such cases *include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner* " (A/56/10, p 240, para 5, emphasis added)

71 Under the assumption that the United States is in breach of an international obligation, that Mexico suffered an injury for which a remedy is sought, and that the United States cannot "rely on the provisions of its internal law as justification for failure to comply with its obligations", there are sufficient legal grounds to assume that if the procedural default rule is perpetuated in the United States courts, then there is little future for a meaningful and effective mechanism of judicial review and reconsideration If this assumption remains valid, then it may be indispensable for the Court to recover the concept of "juridical restitution" invoked by the International Law Commission, which becomes applicable when there is a need to modify a legal situation within the legal system of the responsible State It is worth repeating juridical restitution may

> "include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner" (A/56/10, p 240, para 5).

It may happen that the judicial measure, if found in breach of an international obligation, has to be rescinded through legislative means

XII

72 In its final submission, Mexico requests the Court to adjudge that the United States "shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals" Yet the Court found that "Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals" (Judgment, para 148) But the continuing violation can be established by examining the cases detailed in the Application of Mexico (paras 67-267) By consulting the specific cases, it becomes clear that there are two elements in the continuous breach of obligations by the United States

(a) from 1979 to 1999, that is to say during the 20 years considered in Mexico's Application (in terms of the first arrest and the last arrest of the 52 Mexican nationals included in the Application), there was no compliance on the part of the competent authorities of the United States in the fulfilment of their Article 36 obligations That has already been decided by the Court in the present case;

(b) in the post-*LaGrand* stage, United States courts continue to apply the doctrine of procedural default. As the Court has stated, "a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule" (Judgment, para 133) The Court in *LaGrand* had the opportunity to define the scope of the procedural default doctrine:

> "In itself, the rule does not violate Article 36 of the Vienna Convention The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (*LaGrand, Judgment, I C J Reports 2001*, p 497, para 90)

73 In the post-*LaGrand* phase, the process of review and reconsideration has not meant the inapplicability of the procedural default doctrine

If the Court has found that the United States is in breach of Article 36 of the Vienna Convention, as it already has, it follows that a cessation of such continuous violations is a proper measure in order to secure an end to a continuing wrongful conduct.

74 According to the arguments submitted during the proceedings, there are 102 Mexican nationals that have been detained and charged with serious felonies after the *LaGrand* Judgment was issued, without being notified of their rights to consular notification and access In 46 of these 102 cases, the United States effectively does not dispute the violation Six out of the 46 cases face the potential imposition of the death penalty

75 The United States provides a number of countervailing arguments but no evidence to contradict the facts submitted by Mexico The arguments point out that "the United States has demonstrated that its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results" It adds that

> "Mexico would have the Court dictate to the United States that it cease applying — and also guarantee that it would in fact not apply — a wide variety of fully proper municipal legal doctrines and decisions, the combined scope of which is staggering" (CMUS, paras 8.36 and 8 38)

76 The United States considers that the 102 cases — or, for that matter, the six cases — submitted by Mexico are "isolated cases" But the issue is to determine whether there is a continuity in the failure to comply with Article 36 obligations by the United States. That seems to be the case The United States may undertake a commitment "to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1, of the Convention" But the effectiveness of this commitment is what is lacking Thus the need to establish the concrete guidelines that should be followed by the United States. These guidelines must comprise the obligation to cease an internationally wrongful act.

77 The International Law Commission (ILC), in its Draft Articles on State Responsibility, has introduced the criteria governing the extension in time of the breach of an international obligation. In its Commentary to Article 14, paragraph 2, it indicates

> "a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State " (A/56/10, p 139, para 3.)

78. The Court has found, in a number of cases, the need to order the cessation of an unlawful conduct Examples of these orders include the

case of *Military and Paramilitary Activities in and against Nicaragua*, the case of *United States Diplomatic and Consular Staff in Tehran*, and the *Arrest Warrant* case

In the *Tehran* case the Court decided unanimously that Iran "must immediately terminate the unlawful detention of the United States Chargé d'Affaires and other diplomatic and consular staff " (*United States Diplomatic and Consular Staff in Tehran, Judgment, I C J Reports 1980*, para 95).

The Court decided, in the *Nicaragua* case, that "the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligation" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, I C J Reports 1986*, p. 149, para 12)

In the *Arrest Warrant* case the Court found that: "the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant . " (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v *Belgium), Judgment, I C J Reports 2002*, p 33, para. 3)

79 The legal reasoning that compels the need for the cessation and non-repetition of a breach of an international obligation is the continued duty of performance To extend in time the performance of an illegal act would frustrate the very nature and foundations of the rule of law. As the ILC in Article 29 of its Draft Articles on State Responsibility indicates, "The legal consequences of an international wrongful act do not affect the continued duty of the responsible State to perform the obligation breached " In the Commentary to this Article, the ILC states

> "Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act . and the obligation of cessation " (A/56/10, p 215, para 2)

80 To cease an illegal act and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, is not a discretionary matter the State responsible for an internationally wrongful act is under an obligation to do precisely that, according to Article 30 of the ILC Draft Articles on State Responsibility In its Commentary to this Article, the ILC provides a useful consideration

> "Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past " (A/56/10, p 221, para 11)

XIII

81 Mexico's claims are only partially answered in the present Judgment Some of the holdings are more modest than the ones that are to be found in the *LaGrand* Judgment. Some even contradict the rulings of *LaGrand* The limited legal reach provided in the present Judgment may not sufficiently serve the purpose of establishing the grounds for reparations as a result of a wrongful act and the breach of an international obligation The law of State responsibility may not find in the present Judgment a source of further development

(Signed) Bernardo SEPULVEDA